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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1170

ADAM FARKAS,
PETITIONER,

v.

TEXAS INSTRUMENTS, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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OPINIONS BELOW

The Memorandum Opinion of the District Court (A. 23-28)[1] is not reported. The per curiam opinion of the United

[1] In this brief the citation "A" followed by a number refers to a page of one of the Appendices attached to the Petition for a Writ of Certiorari.

States Court of Appeals for the First Circuit (A. 30-34) is reported at 429 F. 2d 849.

STATUTES INVOLVED

Sections 3 and 3A of Chapter 181 and Sections 37 and 38 of Chapter 223 of the General Laws (Ter. Ed.) of Massachusetts are set forth in Appendix A to this brief.

QUESTIONS PRESENTED

The single question presented for review in this case is whether the United States Court of Appeals for the First Circuit was correct in affirming the District Court's judgment of dismissal as against the defendant Texas Instruments Incorporated because of "lack of jurisdiction over the person." Rule 12(b), *Federal Rules of Civil Procedure.*

No novel point of state or federal law is involved, nor are there any other "special and important reasons" for granting certiorari in this case. Rule 19, *Rules of the Supreme Court of the United States.* The jurisdictional question breaks down into two specific and essentially routine questions of statutory interpretation. These two questions, involving two Massachusetts service of process statutes, are as follows:

1. Whether service of process on the Secretary of State of the Commonwealth of Massachusetts pursuant to Section 3A of Chapter 181 of the Massachusetts General Laws was effective to confer jurisdiction over the defendant, a foreign corporation, where the plaintiff's causes of action did not arise out of any activity of the defendant in Massachusetts and the statute specifically states that service in accordance with its terms is effective "in relation to any cause of action

or proceeding arising out of" business done by a foreign corporation defendant in Massachusetts.

2. Assuming the plaintiff were to attempt service of process pursuant to Section 38 of Chapter 223 of the Massachusetts General Laws, whether the provisions of that statute would confer jurisdiction over the defendant, a foreign corporation, where the plaintiff is a non-resident of Massachusetts, the defendant's activity in Massachusetts is limited to the solicitation of orders by nine salesmen who cover New England, and the plaintiff's causes of action are completely unrelated to Massachusetts or to the solicitation defendant does in Massachusetts.

STATEMENT OF THE CASE

The petitioner Adam Farkas (hereinafter "Farkas" or "the plaintiff") is a citizen of Rhode Island who formerly resided in Texas where for a time he was an employee of the respondent Texas Instruments Incorporated (referred to as "Texas Instruments, Inc." in the petitioner's papers). The respondent Texas Instruments Incorporated (hereinafter "TI" or "the defendant") is a Delaware corporation having its principal place of business in Dallas County, Texas.

On May 5, 1967 Farkas began this action, "for what appears to be wrongful discharge and conspiracy" (A. 30), in the United States District Court for the District of Massachusetts (A. 32). The named defendants were "Dallas Mayor, Erik Jonsson, Texas Instruments, Inc., Ling-Temco-Vought, Inc. (hereinafter "LTV") and Joe Morris Landtroop, USN" (A. 22). In substance the complaint recited the same grievances against TI and LTV as those dealt with approximately one month earlier by the United States Court of Appeals for the Fifth Circuit in *Farkas* v.

Texas Instrument, Inc. and Ling-Temco-Vought, Inc. 375 F.2d 620 (5th Cir., March 31, 1967) *cert. denied* 389 U.S. 977 (1967).

Service of process was purportedly made upon TI by delivery of copies of the summons and complaint at the office of the Secretary of State of the Commonwealth of Massachusetts in accordance with Chapter 181 of the General Laws of Massachusetts (A. 23-24). TI is not registered as a foreign corporation in Massachusetts (A. 24). Service of process was never made upon the two individual defendants and a subsequent motion by the plaintiff to dismiss as to them was allowed. LTV, which is registered as a foreign corporation in Massachusetts, was served by means of service on the Secretary.

Since the original complaint was not in proper form (A. 32), motions to strike by TI and LTV were allowed, the plaintiff being granted leave to file a motion to amend his complaint. On two subsequent occasions the plaintiff moved to amend his complaint but the motions were not allowed (A. 32). In February 1969 James J. Twohig, Esq., an attorney, filed his appearance on behalf of the plaintiff (A. 32).[2] A new motion to file an amended complaint was filed (A. 32) and later allowed as against TI. As against LTV, the decision of the Court was reserved. TI thereupon filed a motion to quash service of process and to dismiss on the ground that the plaintiff's service of process on TI was ineffective and did not subject it to personal jurisdiction (A. 23-24).

On December 31, 1969, after hearing, the motion to dismiss was allowed and a memorandum opinion filed (A. 23-28). The District Court held that service on the Secretary did not confer jurisdiction over TI pursuant to G.L. (Ter. Ed.) c. 181 §3A because the plaintiff's claims arose in

[2] Earlier in the case Ira L. Schreiber, Esq., was attorney for Farkas during the period from June 16, 1967 to September 11, 1967.

Texas, whereas Section 3A applies by its express terms only "in relation to any cause of action or proceeding arising out of such [i.e. Massachusetts] business". (A. 24-25). It further held that service on TI pursuant to G.L. c. 223 §38 — the only other ground advanced by the plaintiff — would not be effective either (A. 28). That statute, as interpreted by the Massachusetts courts, does not provide jurisdiction where the defendant's activities in the state are not substantial and the claims of the plaintiff (a non-resident) have no connection whatever with such in-state activities. (A. 25-28).

Shortly thereafter, on January 20, 1970, at a hearing of plaintiff's motion to amend his complaint as against LTV, no one appeared for the plaintiff (A. 29). The motion was denied in the exercise of the court's discretion, and an order entered dismissing the action (A. 29). Subsequently the plaintiff moved for rehearing of his motion to file an amended complaint as against LTV (A. 32). This motion for rehearing was scheduled to be heard on February 3, 1970, but on January 28, 1970 the plaintiff filed a withdrawal of the motion (A. 32).

On appeal, the United States Court of Appeals for the First Circuit affirmed the judgment of dismissal as against TI "on the opinion of the district court . . . and *Seymour* v. *Parke, Davis, Inc.*", 423 F.2d 584 (1st Cir. 1970). The judgment in favor of LTV was reversed and the case against it remanded for further proceedings. In *Seymour*, decided a few months earlier, the Court of Appeals had held that service pursuant to the terms of New Hampshire's long arm statute was not constitutionally permissible where the defendant's activity in the state was slight (principally the solicitation of orders by a half dozen salesmen), the plaintiff's cause of action was completely unrelated to New Hampshire, and the plaintiff himself had no connection with the forum.

Prior to oral argument, the Court of Appeals had called to the attention of Farkas and TI its recent decision in *Seymour* v. *Parke, Davis, Inc.* (A. 39), saying that it proposed to summarily affirm the judgment in favor of TI under a local rule of court unless Farkas indicated in writing why it should not do so (A. 39). Farkas replied "by contending that TI operates a large plant in Attleboro, Massachusetts" (A. 31). TI, on the other hand, "represented to the court that the Attleboro plant is owned by a TI subsidiary, Texas Instruments, Inc., a Massachusetts corporation, and not by TI, against whom the action was brought." (A. 31).

The appeal was argued in the usual way and summary disposition was not made pursuant to local rule. The Court granted leave to Farkas "to file copies of official documents, from the Secretary of State or otherwise, that would show that Texas Instruments, Inc. (Attleboro) is the same corporation as TI." (A. 31). Farkas did not do so (A. 31). Subsequently, TI, at the request of the Court, filed a certificate of the Secretary of State attesting to the fact "that Texas Instruments, Inc. (Attleboro) is a Massachusetts corporation" (A. 31).

The petitioner has improperly inserted in his Petition (at pages 15-19) "pieces of evidence thrown out by U.S. Chief Judge Aldrich" (Petition, p. 14) which are not a part of the record before this Court. In addition, a significant portion of the Petition relates, not to the jurisdictional question under consideration, but to various asserted facts bearing upon the petitioner's underlying claims. (See e.g. Petition, pp. 4-7). TI will not in this brief present argument with respect to these matters that are not before the Court. It suffices to say that it is TI's position that the plaintiff's claims of conspiracy, wrongful discharge, black-

listing, etc. are unfounded — a position supported, it will be noted, by a decision of The President's Committee on Equal Employment Opportunity. *Farkas* v. *Texas Instrument, Inc. and Ling-Temco-Vought, Inc.*, 375 F.2d 629, 633 (5th Cir. 1967) *cert. denied* 389 U.S. 977 (1967).

ARGUMENT

In this case the plaintiff is not a resident of Massachusetts; the causes of action he alleges did not arise in Massachusetts; and although the defendant TI solicits orders in Massachusetts, it does not engage in local business there, it is not qualified there as a foreign corporation, and the plaintiff's causes of action did not arise from the solicitation which TI does there. Service of process was purportedly made upon TI pursuant to Section 3A of Chapter 181 of the General Laws of Massachusetts by delivery of copies of the summons and complaint to the Secretary of State for the Commonwealth. The District Court ruled that this service was ineffective because Section 3A of Chapter 181 applies by its terms only with respect to causes of action arising from business done by the defendant in Massachusetts. It further ruled that personal jurisdiction did not exist over TI "on any [other] ground advanced by plaintiff" and therefore dismissed the action as against TI (A. 28). The Court of Appeals affirmed the judgment of dismissal (A. 31).

These rulings were fully warranted. They follow the governing Massachusetts state court and federal court decisions interpreting the statutes in question. They raise no novel point of law. They present no conflict with decisions of this Court or of the other Courts of Appeals.

I. ALLOWANCE OF THE MOTION TO QUASH WAS PROPER BECAUSE SERVICE OF PROCESS ON THE SECRETARY OF STATE WAS NOT EFFECTIVE TO CONFER JURISDICTION OVER THE DEFENDANT.

A. *Section 3 Of Chapter 181 Of The General Laws Of Massachusetts Is Not Applicable Because The Defendant Is Not A Foreign Corporation Registered To Do Business In Massachusetts.*

The provisions of Massachusetts law which relate to service upon the Secretary of State as a means of serving foreign corporations with process are Sections 3 and 3A of Chapter 181 of the General Laws.

Section 3 has no application in this instance. It refers solely to foreign corporations which have qualified to do business in Massachusetts and, in connection with such qualification, have filed a written statement appointing the Secretary of State as their "true and lawful attorney upon whom lawful process in any action or proceeding . . . may be served." TI, however, as the District Court found, "was not registered under Mass. Gen. Laws, Ch. 181, to do business in the Commonwealth when the process was served on the Secretary"; "was last qualified on January 11, 1961, when it filed with the Secretary an affidavit of withdrawal of the right to do business in Massachusetts"; "has never registered here since that date"; and "has not appointed the Secretary under Mass. Gen. Laws, Ch. 181, §3, its agent to receive service of process against it." (A. 24).

As a result, service upon the Secretary of State was not effective to confer jurisdiction over TI unless the provisions of Section 3A of Chapter 181 are applicable.

B. *Section 3A Of Chapter 181 Of The General Laws Of Massachusetts Does Not Make The Defendant Subject To Jurisdiction Because The Plaintiff's Claims Do Not Arise From Business Done By The Defendant In Massachusetts.*

Section 3A of Chapter 181 of the General Laws of Massachusetts confers jurisdiction over a foreign corporation defendant only when that corporation is doing business in Massachusetts and the cause of action alleged by the plaintiff is a cause of action which arose out of such business. The specific language of Section 3A is, in part, as follows:

> "Any such corporation which does business in this commonwealth without complying with the provisions of section three, . . . shall, without affecting any penalty, liability or disability imposed by section five, be deemed and held, *in relation to any cause of action or proceeding arising out of such business*, to have appointed the secretary and his successor in office to be its true and lawful attorney, and any process in any such action or proceeding against it served upon the secretary or his successor in office shall be of the same legal force and validity as if served on such corporation." (Emphasis added.)

The Supreme Judicial Court of Massachusetts has said that the term "arising out of such business" means "business arising in this Commonwealth." *Remington Arms Company, Inc.* v. *Lechmere Tire & Sales Co.*, 339 Mass. 131, 136, 158 N.E. 2d. 134, 138 (1959).

In accordance with this express statutory requirement, the decisions in the First Circuit have uniformly held that service upon the Secretary of State pursuant to Section 3A does not confer jurisdiction over a foreign corporation

when the cause of action alleged by the plaintiff does not arise out of business done by the foreign corporation within the Commonwealth of Massachusetts. *Boston Packaging Machinery Co.* v. *Woodman Company*, 125 F. Supp. 567 (D. Mass. 1954); *William I. Horlick Co., Inc.* v. *Bogue Electric Manufacturing Co.*, 140 F. Supp. 514 (D. Mass. 1956); *Nichols* v. *Cowles Magazines, Inc.*, 103 F. Supp. 864, at 866 (D. Mass. 1952), *modified on other grounds* 108 Supp. 883; *Coakley* v. *Frank A. Munsey Co.*, 50 F. Supp. 83, at 85 (D. Mass. 1943). And see *Caso* v. *Lafayette Radio Electronics Corp.*, 370 F.2d 707, 711 n. 5 (1st Cir. 1966).

That is the case here. The District Court specifically found that "the wrongs alleged by plaintiff occurred in Texas" and were unrelated to Massachusetts (A. 24). The provisions of Section 3A, therefore, are not applicable.

II. DISMISSAL OF THE ACTION WAS PROPER BECAUSE THE PLAINTIFF DID NOT SHOW THAT THERE IS ANOTHER METHOD OF SERVICE BY WHICH PERSONAL JURISDICTION MAY BE OBTAINED OVER THE DEFENDANT.

Where service has been ineffectual and a motion to quash allowed, an action will be dismissed if there is no likelihood that personal jurisdiction can be obtained over the defendant by another method of service. *Jones* v. *Motorola, Inc.*, 186 F.2d 707 (2d Cir. 1959); *Wilson* v. *Hazard*, 145 F. Supp. 23 (D. Mass. 1956); *Boston Packaging Machinery Co.* v. *Woodman Co.*, 125 F. Supp. 567 (D. Mass. 1954); *Nichols* v. *Cowles Magazines, Inc.*, 108 F. Supp. 883 (D. Mass. 1952). Since the plaintiff has the burden of proving the prerequisite jurisdictional facts, dismissal of the action is proper unless the plaintiff makes the necessary showing that another method of obtaining jurisdiction exists. *Aro Manufacturing Co.* v. *Automobile*

Body Research Corp., 352 F.2d 460, 463, (1st Cir. 1965); *Lisotte* v. *Canadian Johns-Manville Co.*, 367 F.2d 607, 608 (1st Cir. 1967). *Canvas Fabricators Inc.* v. *William E. Hooper & Sons Co.*, 199 F.2d 485, 488 (7th Cir. 1952).

In the present case the plaintiff argued below that another such method does exist — i.e. service on TI in accordance with Section 38 of Chapter 223 of the General Laws of Massachusetts. The courts below correctly held, however, that this statute, properly construed, also does not confer personal jurisdiction over TI under the circumstances of this case.

A. *Service Of Process Pursuant To Section 38 Of Chapter 223 Of The General Laws Of Massachusetts Would Not Be Effective.*

Section 38 of Chapter 223 of the General Laws provides that service may be made upon a foreign corporation "engaged in or soliciting business in the commonwealth" in accordance with the provisions of Section 37 of the same chapter. The latter section provides for service to be made "upon the president, treasurer, clerk, cashier, secretary, agent or other officer in charge of [the corporation's] business, or, if no such officer is found within the county, upon any member of the corporation."

The Massachusetts law on the jurisdictional scope of this statute has been carefully analyzed by the United States Court of Appeals for the First Circuit in *Caso* v. *Lafayette Radio Electronics Corporation*, 370 F.2d 707 (1st Cir. 1966). Under the principles there laid down, it is clear that TI would not be subject to service. In the first place, its activity in Massachusetts consists of the solicitation of orders for interstate sales — and this alone has never been found sufficient in Massachusetts as a basis for personal jurisdiction under Section 38 (*Id* at 711). Second, even if

TI's activity in Massachusetts amounts to "solicitation plus", this (with one exception) has not been considered by the Massachusetts courts to be sufficient as a basis for personal jurisdiction where, as here, "the cause of action did not arise out of the activities in Massachusetts" (*Id* at 711-712).

The one exception to this second principle — i.e. "where the [foreign] corporation's activities more closely approximate[d] the regular conduct of a domestic corporation" (*Id* at 712) — is also not applicable to the facts of this case. TI's activity in Massachusetts, even if it transcends "mere solicitation" and "solicitation plus", by no means may be said to closely approximate "the regular conduct of a domestic corporation." TI's small sales office in Waltham serves as a headquarters for nine salesmen who solicit orders throughout New England. (A. 26). It makes no sales in Massachusetts; keeps no stock of goods here; does no invoicing; makes no deliveries; makes no collections; and receives no remittances (A. 26-27). This falls far short of "the regular conduct of a domestic corporation." *Cf. Trojan Engineering Corp.* v. *Green Mountain Power Corp.*, 293 Mass. 377, 200 N.E. 117 (1936).

Furthermore, there is no basis for subjecting TI to jurisdiction simply because it has subsidiary corporations in Massachusetts — one in Canton and another in Attleboro. As a general rule, "the relationship of parent corporation and subsidiary corporation is not of itself a sufficient basis for subjecting the nonresident parent corporation to the jurisdiction of the forum state." 2 Moore, *Federal Practice* (2d Ed.) ¶ 4.25 [6], p. 1174. In the First Circuit's words, "the separate corporate identity, although formal, is real." *Caso* v. *Lafayette Radio Electronics Corp.*, 370 F.2d 707, 712 (1st Cir. 1966). To be sure, if a plaintiff establishes that the parent exercises a large degree of control over the various aspects of the subsidiary's busi-

ness, and that the subsidiary exerts itself solely for the benefit of the parent, an agency relationship may be inferred which would support a finding that the parent itself is "doing business" within the state. *Cuno v. Lafayette Radio Electronics Corp.*, *supra* at 712-713. That is not the case here. The record is completely devoid of any such proof. Furthermore, it will be noted that both of the TI subsidiaries — the Canton distributor which is registered here as a foreign corporation (A. 27), and the Attleboro subsidiary which is a domestic corporation (A. 31) — are clearly subject to suit in Massachusetts, a factor which should "lessen the state's interest in regulation of the foreign [parent] corporation." *Cuno* v. *Lafayette Radio Electronics Corp.*, 370 F.2d 707, 712 (1st Cir. 1966).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Massachusetts General Laws (Ter. Ed.) c. 181, §3:

§ 3. State Secretary to Be Appointed Attorney for Service of Process.

Every foreign corporation, which does business in this commonwealth or which has a usual place of business in this commonwealth, or owns real property therein without having such a usual place of business or, which is engaged therein, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, or in the construction or repair of roads, highways or waterways, or in any other activity requiring the performance of labor, shall, before doing business in this commonwealth, in writing appoint the state secretary and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth. The power of attorney and a copy of the vote authorizing its execution, duly certified and authenticated, shall be filed in the office of the said secretary, and copies certified by him shall be sufficient evidence thereof. Service of such process shall be made by leaving a copy of the process in duplicate with a fee of two dollars in the hands of the secretary, or his deputy, or in the office of the secretary, and such service shall be sufficient service upon the corporation.

Massachusetts General Laws (Ter. Ed.) c. 181, §3A:

§ 3A. Certain Foreign Corporations Failing to Register to Be Deemed to Have Appointed Secretary for Service of Process.

Any such corporation which does business in this commonwealth without complying with the provisions of section three, including a corporation as to which the secretary is required by section six to refuse appointment as attorney for service, shall, without affecting any penalty, liability or disability imposed by section five, be deemed and held, in relation to any cause of action or proceeding arising out of such business, to have appointed the secretary and his successor in office to be its true and lawful attorney, and any process in any such action or proceeding against it served upon the secretary or his successor in office shall be of the same legal force and validity as if served on such corporation.

Massachusetts General Laws (Ter. Ed.) c. 223, §37:

§ 37. Actions against Corporations, Person upon Whom Service Shall Be Made.

In an action against a county, city, town, parish or religious society, or against the proprietors of wharves, general fields or real estate lying in common, who are incorporated, service shall be made upon the treasurer thereof, or if no treasurer is found, upon one of the county commissioners, the city clerk or one of the aldermen, the town clerk or one of the selectmen, upon one of the assessors or standing committee of the parish or religious society, or upon one of the proprietors of such land or other estate, as the case may be. If there are no such officers as are mentioned in this section, service shall be made upon one of the inhabitants of the county, city or town, or upon one of the members of the corporation.

In an action against a domestic corporation other than one mentioned in the preceding paragraph service shall be made upon the president, treasurer, clerk, resident agent appointed pursuant to section forty-nine of chapter one hundred and fifty-six B, cashier, secretary, agent or other officer in charge of its business, or, if no such officer is found within the county, upon any member of the corporation. If an officer authorized to serve legal process makes a return on such process that, after diligent search, he can find no one upon whom he can lawfully make service as aforesaid, the court to which such process is returned may upon application issue an order of notice to such corporation, directing it to appear and answer within a designated period. Such order of notice shall contain an exact copy of the legal process referred to in the preceding sentence. The party making such application shall deliver a copy of such order in duplicate with a fee of two dollars to the state secretary or a deputy, or in the office of said secretary. Said secretary shall forthwith cause said copy to be forwarded by registered mail, return receipt requested, to such corporation at such address as may be designated for the purpose by a writing signed by its president, treasurer or clerk and filed with said secretary or if no such address has been designated, to its principal place of business in the commonwealth as stated in the last certificate of condition filed by it or, if no certificate has been filed by it, as stated in its articles of organization or any articles of amendment thereof. As soon as may be after such mailing by said secretary, he shall transmit a certificate to the court issuing such order, stating that he has complied with the provisions of this section, and shall attach thereto the return receipt or the undelivered copy, as the case may be. The clerk shall note upon the docket the name of the corporation and the address to which such copy was mailed by the secretary, and shall file with the papers in the case the certificate of

the secretary and the return receipt or undelivered copy, as the case may be, and such service shall be a sufficient service upon such corporation. The court in which the action is pending may order such continuances as may be necessary to afford the corporation reasonable opportunity to defend the action.

Massachusetts General Laws (Ter. Ed.) c. 223, §38:

§ 38. Service on Foreign Corporations.

In an action against a foreign corporation, except an insurance company, which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of upon the commissioner of corporations and taxation under section three or section three A of chapter one hundred and eighty-one.